STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 1, 2006
v	No. 259297 Oakland Circuit Court
JOSEPH CORTEZ DAVENPORT, Defendant-Appellant.	LC No. 2004-195472-FC

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to concurrent prison terms of 9 to 20 years for each offense. He appeals as of right. We affirm.

I. FACTS

Defendant was convicted of sexually assaulting his cousin's girlfriend's daughter, aged 10 at the time of trial. In 2003, the victim's mother was dating a coworker, Ezi Washington. In the summer of 2003, defendant, Washington's cousin, obtained employment at the same store and was often at the victim's house with Washington. The victim testified that defendant, whom she referred to as "Joe-Joe," often played video and board games with her and her two siblings in her room. The victim indicated that, in August or September 2003, when she was nine years old, she and defendant were in her room playing Playstation when defendant digitally penetrated her vagina. The victim explained that she and defendant were lying on her bed with a blanket over them, she was lying on her stomach, and defendant put his hand in her pants, then inside her vagina, and rubbed it up and down. The victim indicated that similar incidents of defendant digitally penetrating her vagina occurred four or five times, on different days, and that each incident occurred in her room while she and defendant were playing Playstation.

The victim testified that she did not say anything to defendant because she was afraid and did not understand what was happening. The victim told her friend, AH, that defendant had assaulted her. AH testified that, in the summer of 2003, after the victim told her what defendant had done, she told her mother. In turn, AH's mother told the victim's mother, who then confronted the victim, along with Washington. Washington then talked to defendant, who thereafter quit his job and never returned to the victim's house again. The victim's mother did not report the matter to the police at that time. Subsequently, when the victim visited her

paternal grandmother and uncle in November 2003, she talked to her grandmother about defendant, whom she referred to as "Joe." In turn, the victim's grandmother directed the victim's uncle to speak with the victim. As a result of what the victim told her grandmother and uncle, the victim's uncle instructed the victim's mother to contact the police, which she did.

II. Inadmissible Hearsay

Defendant first argues that he is entitled to a new trial because the prosecutor bolstered the victim's testimony by eliciting improper hearsay evidence of the victim's prior consistent statements to her grandmother, uncle, and a police officer. We disagree.

A. Standard of Review

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Here, however, defendant failed to object to all of the testimony he now challenges on appeal.[1] We review those unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998). No one may bolster a witness's testimony using that witness's prior consistent statements unless the statements fall under a hearsay exception, or are not admitted as substantive evidence. MRE 801(d)(1)(B); *People v Hallaway*, 389 Mich 265, 275-276; 205 NW2d 451 (1973); *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987).

B. The Victim's Uncle

Defendant claims that the victim's uncle's testimony that the victim's grandmother told him "what had happened," and identified defendant as the perpetrator constituted impermissible hearsay. During trial, the victim's uncle indicated that, during the victim's visit, something out of the ordinary happened. When the prosecutor asked the victim's uncle what happened, she first cautioned, "[w]ithout telling me what anybody told you . . ." The victim's uncle then testified that his mother told him that he needed to speak to the victim, who had something to tell him. The victim's uncle indicated that he could see that the victim had been crying, so he asked her "what was going on," and she told him "what was making her cry." The victim's uncle did not reveal the content of the victim's statements to him. Rather, he indicated that, after the

[1] Defendant did not object to the testimony of the victim's uncle, or the police officer. Although defendant objected to portions of the victim's grandmother's testimony, he did not object to her testimony that she told the victim's uncle to call the police because someone had "molested" the victim.

victim talked to him, he became angry. The prosecutor then asked if the victim revealed "who was doing that," and the victim's uncle responded affirmatively. When the prosecutor asked whom the victim identified, defense counsel objected on hearsay grounds. In response, the prosecutor responded that the testimony was admissible under MRE 801(d), as a statement of identification, and defense counsel withdrew her objection. The victim's uncle then testified that the victim identified the person as "Joe-Joe."

MRE 801(d)(1)(C) provides that "[a] statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." We decline to address whether the victim's uncle's testimony was properly admitted under MRE 801(d)(1)(C). With regard to this testimony, defense counsel affirmatively withdrew her objection, thereby agreeing to its admissibility. Given defense counsel's decision of how to handle the matter, defendant cannot now complain of an error. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Accordingly, any objection in this regard was waived, and there is no error to review. *Id.* at 214-216.

We nonetheless believe it is important to add a note of caution with respect to this element of our hearsay analysis. Defense counsel withdrew the objection to the victim's uncle's testimony, accordingly, admission of the testimony was not error requiring reversal. But, it merits noting that although the prosecutor asserted the testimony was admissible under MRE 801(d) as a statement of identification, the facts do not support a claim for admissibility under MRE 801(d)(1)(c). To qualify, a statement of identification must be "made after perceiving the person." Here, the victim's statement was made months after the events in question at her grandmother's house where defendant was not present. A statement of identification is one made based on perception, not recollection, and here the statement in question simply does not meet the criteria.

Even if this testimony was erroneously admitted, we conclude that any error in the admission of the uncle's testimony as a non-hearsay statement of identification was harmless because the statement was virtually identical to the victim's own testimony, which was admissible. Nevertheless, the principles that separate admissible from inadmissible hearsay require attention and protection any time the separation is called into question or the line is blurred.

C. The Police Officer

With regard to the police officer's testimony, the record shows that he did not testify about any prior consistent statements that the victim made. Rather, the officer testified that he went to the victim's home and took an initial "criminal sexual conduct report" from the victim's mother and her uncle in November 2003, and that defendant was identified as the perpetrator. However, he did not take a report from the victim because she was "visibly shaken," crying, and "just scared of [him.]" Defendant has failed to explain how the police officer's general testimony that he took a criminal sexual conduct report constitutes inadmissible hearsay, and, specifically, prior consistent statements of the victim. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims[.]" *Watson, supra* at 587 (citation omitted). Consequently, this claim does not warrant reversal.

D. The Victim's Grandmother

With regard to the victim's grandmother, defendant first points to her testimony that the victim told her that she did not like Washington's friend "Joe." In response to defense counsel's objection, the trial court indicated that the witness was "getting into hearsay." Thereafter, the prosecutor cautioned the victim's grandmother, indicating that she "can't tell [her] what [the victim] has told [her]." The victim's grandmother then testified that she asked the victim why she did not like "Joe," and that the victim told her why. The victim's grandmother did not reveal what the victim told her. The victim's grandmother then indicated that she asked the victim additional questions. When the prosecutor asked the victim's grandmother about the additional questions, defense counsel objected, and the trial court excused the jury.

Outside the presence of the jury, the prosecutor argued that evidence of the questions was not hearsay because the victim's grandmother is the declarant and the statements were not being used for the truth of the matter asserted. Rather, they were being offered to explain the victim's grandmother's subsequent actions, namely encouraging both the victim's mother and uncle to call the police. The trial court ruled that the victim's grandmother's testimony regarding her own statements, i.e., her questions, were admissible to show her "subsequent conduct . . . to explain why she did what she did." The victim's grandmother then testified about what questions she asked the victim, including "who Joe was," "why didn't she like him," and "how many times an incident had happened." The victim's grandmother testified that, after asking the questions, she told her son, the victim's uncle, to speak to the victim's mother, and contact the police when they returned home.

On this record, we cannot conclude that the trial court abused its discretion in admitting the victim's grandmother's statements to show the effect they had on her, and to explain her subsequent actions of instructing her son and the victim's mother to call the police. Additionally, the victim's grandmother's testimony did not relay the contents of the victim's statements in response to her questions. Consequently, the trial court did not abuse its discretion in admitting the testimony.

However, the prosecutor later asked the victim's grandmother if she told her son the reason he had to call the police. In response, the victim's grandmother testified that she said, "You need to call the police because somebody molested [the victim]." Even if this statement could be considered as improper bolstering, defendant did not object to this testimony below, and has not demonstrated a plain error affecting his substantial rights. *Carines*, *supra*. In brief, it is highly unlikely that the victim's grandmother's testimony that she told her son to call the police because the victim was molested caused the jury to convict an otherwise innocent person. *Id.* The victim testified at trial regarding the alleged acts and that she told her friend, AH, about the sexual assaults. AH testified at trial and corroborated the victim's testimony.[2] Consequently, defendant is not entitled to a new trial on this basis.

[2] Defendant acknowledges that the victim's statements to AH were admissible under the tender years exception, MRE 803A.

III. Great Weight of the Evidence

We reject defendant's claim that he is entitled to a new trial because the verdict was against the great weight of the evidence. Defendant failed to preserve this issue by raising it in a motion for a new trial, therefore, review of this unpreserved issue is limited to plain error affecting defendant's substantial rights. *Carines*, *supra*; *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A. Standard of Review

In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *Musser*, *supra* at 218-219. A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted).

B. Analysis

Defendant has failed to demonstrate plain error. There was undisputed evidence that defendant was regularly at the victim's home in the summer of 2003 and played games with the victim and her siblings. The victim testified in detail that defendant digitally penetrated her vagina on four or five occasions in the summer of 2003 while they were playing Playstation in her bedroom. Contrary to defendant's claims, there is no requirement that physical evidence, or that eyewitnesses corroborate the victim's testimony. Rather, a victim's uncorroborated testimony is sufficient to convict a defendant of CSC. MCL 750.520h; *Lemmon, supra* at 632 n 6.

Defendant notes that the victim's testimony that she and defendant were alone in her bedroom at the time of the sexual assaults was contradicted by another witness's testimony that he was never alone with the victim in her room. But this inconsistency does not warrant a new trial because it did not render the victim's testimony void of all probative value, or utterly unable to be believed by the jury. See *id.* at 643. Moreover, conflicting testimony and questions regarding the credibility of witnesses are not sufficient grounds for granting a new trial. *Id.* Indeed, "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 644-646 (citation omitted). In sum, the evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict was allowed to stand. *Id.* at 627.

IV. Adequacy of the Information

Next, defendant challenges the constitutional adequacy of the three charges of first-degree CSC, claiming that they were not sufficiently differentiated, did not provide adequate notice and curtailed his right to defend against each specific count. We disagree.

A. Standard of Review

Defendant did not raise this claim below, consequently, we review this unpreserved issue for plain error affecting substantial rights. *Carines, supra*.

B. Analysis

"A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). An information provides adequate notice when it informs the defendant of the charges he will have to defend against. *Id*. In determining whether the time of the offense is sufficiently specific in the information, the following factors are relevant: "(1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986). "An information is presumed to be framed with reference to the facts disclosed at the preliminary examination." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

Here, considering the relevant factors, the information, coupled with the preliminary examination, was constitutionally sufficient to place defendant on notice. The information charged defendant with three counts of first-degree CSC, named the alleged victim, and indicated that the offenses occurred in the summer of 2003. At the preliminary examination, the victim testified that defendant digitally penetrated her vagina on five or six occasions, in her bedroom, while playing a game in the summer of 2003. Thus, defendant was on actual notice of the charges against him in advance of trial.

Additionally, the prosecutor attempted to pinpoint exact dates, although, at the preliminary examination, the victim could only recall that the acts occurred in the summer of 2003. Nonetheless, this Court has held that time is not of the essence, nor is it a material element in a CSC case, particularly where the victim is a child. *Stricklin, supra* at 634. Furthermore, defendant has not demonstrated how his ability to prepare a defense was prejudiced. The defense consistently denied that any sexual contact occurred, claimed that the victim was not credible, and defense counsel cross-examined the prosecution witnesses at length. The jury apparently found the victim to be credible. Defendant does not indicate what he would have done differently had additional details about the alleged offenses been provided.

In sum, defendant's due process rights were not violated because the victim did not link each offense to a distinct date, and instead testified, during the preliminary examination and at trial, that defendant digitally penetrated her vagina in the summer of 2003. This claim does not warrant reversal.[3]

[3] Defendant relies on *Valentine v Konteh*, 395 F3d 626 (CA 6, 2005), to support his contention that his due process rights were violated. The *Valentine* Court measured the constitutional adequacy of the felony information against the standard enunciated in *Russell v United States*,
(continued…)

V. Effective Assistance of Counsel

Next, defendant argues that defense counsel was ineffective for failing to challenge for cause or remove by peremptory challenge a juror who stated that he been a "victim of a criminal sexual assault." We disagree.

A. Standard of Review

This Court's review is limited to mistakes apparent on the record because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

B. Analysis

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To justify reversal under either the federal or state constitutions, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Generally, defense counsel's failure to challenge a juror does not provide a basis for a claim of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). Rather, a decision relating to the selection of jurors is generally a matter of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). "A reviewing court cannot see the jurors or listen to their answers to voir dire questions. A juror's . . . facial expression, or manner of answering a question may be important to a lawyer selecting a jury[.]" *Robinson*, *supra* at 94-95.

(…continued)

369 US 749; 82 S Ct 1038; 8 L Ed 2d 240 (1962), which held that a federal indictment must: (1) contain the elements of the charged offense, (2) give the defendant adequate notice of the charges, and (3) protect the defendant against double jeopardy. *Valentine, supra at* 631. The *Valentine* Court cited several circuit court cases to support its position that the standard annunciated in *Russell* is applicable to state charging instruments. *Valentine*, *supra* at 631. But our Supreme Court has explained that "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Accordingly, *Valentine* is not binding on this Court. *Abela, supra*. Additionally, *Valentine* is factually distinguishable from this case. The petitioner in *Valentine* was charged with 40 separate crimes based on two incidents that occurred repeatedly.

Here, it is not apparent from the record that defense counsel lacked a sound strategic reason for retaining the juror, or that defense counsel's decision affected the outcome of the proceedings. During voir dire, the prospective juror stated that he was a victim of sexual abuse as a child, but "it never went to court." However, the prospective juror indicated that he could be fair and impartial and, after questioning by the trial court, indicated that he could decide this case based on the facts. Thereafter, in response to further questioning by defense counsel, the prospective juror indicated that he could "listen to the facts and go by that." A review of the voir dire shows that defense counsel challenged two other jurors who indicated that they were victims of sexual assault. But they indicated that they could not set aside their personal experience and decide the case based on the evidence.

Apparently, defense counsel made a strategic decision to retain the challenged juror. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant is not entitled to a new trial on this basis.

VI. Prosecutorial Misconduct

Defendant also argues that he is entitled to a new trial because the prosecutor impermissibly denigrated defense counsel, asked a witness to comment on the credibility of the victim, and continuously "ask[ed] and use[d] [] the alleged victim's repetitive unsworn statements to the prosecution witness." We disagree.

A. Standard of Review

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant failed to object to some of the prosecutor's conduct below. We review those unpreserved claims for plain error affecting substantial rights. *Carines*, *supra*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

B. Denigration of Defense Counsel

Defendant claims that the prosecutor denigrated defense counsel during the following portion of her rebuttal argument:

> I don't know where the inconsistency was. I didn't see it. Maybe you all, with twelve collective minds, when you go back in there will remember it better than I do.
>
> But I just didn't see any inconsistency. I saw, again, that the role of a defense attorney going down that path and trying to make things seem as if they are not..]

We find merit to defendant's claim that the emphasized portion of the prosecutor's statement was improper. A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Despite the impropriety, reversal is not warranted. Immediately after the prosecutor's statement, defense counsel objected, stating, inter alia, "[t]hat's impermissible to make such accusations about me," and the trial court responded, "All right." The prosecutor said she would "move on." The trial court then instructed the prosecutor to "[j]ust move on." Defendant failed to request any further action by the trial court, and the prosecutor did not discuss the matter further. Any prejudice that may have resulted could have been cured by a timely instruction upon request. *Schutte*, *supra* at 721. Indeed, in its final instructions, the trial court instructed the jury that the lawyers' comments are not evidence, to decide the case based only on the properly admitted evidence, and to follow the court's instructions. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The court's instructions were sufficient to dispel any prejudice caused by the prosecutor's improper comment, accordingly, defendant was not denied a fair trial. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001).

C. Direct Examination of Washington

Defendant also argues that the prosecutor impermissibly asked Washington to comment on the credibility of the victim through the following line of questioning:

> *Q.* Okay. And when you talked to - - to [the victim], what did you think after she told you what happened?
>
> *A.* I didn't know whether to believe her or not to believe her.
>
> * * *
>
> *Q.* Okay. Did you have any reason at that point in time to - - to think that [the victim] was making it up?
>
> *A.* No.

It is improper for the prosecutor to ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). To the extent the prosecutor's question violated this rule, defendant did not object to the exchange, and defendant has not demonstrated that any error affected his substantial rights. *Carines*, *supra*. As noted in *Buckey*, a timely objection "could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction." *Buckey*, *supra* at 18 (citation omitted); see also *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Here, even though defendant did not object, the trial court's instructions that the jury was to assess and determine the credibility of the witnesses

were sufficient to dispel any possible prejudice. *Long*, *supra*. Consequently, reversal is not warranted on the basis of this unpreserved issue.

D. Inadmissible Hearsay

We reject defendant's suggestion that the prosecutor engaged in misconduct by continuously eliciting inadmissible hearsay, i.e., the victim's prior consistent statements, to impermissibly bolster the victim's credibility. As discussed in part II, neither the police officer nor the victim's uncle testified about the victim's prior consistent statements. Additionally, the prosecutor cautioned both the victim's uncle and her grandmother to refrain from repeating anything that the victim told them. In brief, defendant has failed to demonstrate that the prosecutor engaged in any misconduct when questioning the police officer, the victim's grandmother, or her uncle.

VII. SCORING OF SENTENCING

We also reject defendant's final claim that he must be resentenced because the trial court's factual findings supporting its scoring of the sentencing guidelines offense variables were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has stated that the holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.[4]

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper

[4] For the same reason, defense counsel was not ineffective for challenging the trial court's scoring of the offense variables on the basis of *Blakely*, *supra*. Counsel is not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).